IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 26, 2008 Session

JOANN J. SUGG, ET VIR. v. MAPCO EXPRESS, INC.

Direct Appeal from the Circuit Court for Rutherford County
No. 53739 Robert E. Corlew, III, Chancellor

No. M2007-01503-COA-R3-CV - Filed July 9, 2008

In this negligence action, Plaintiff appeals the award of summary judgment in favor of Defendant business owner. While exiting Defendant's convenience store, Plaintiff fell from the curb and sustained injuries. She and her husband filed a complaint against Defendant business owner, alleging that its failure to mark the curb properly and to light the area sufficiently caused her to fall. Defendant filed a motion for summary judgment along with a statement of undisputed facts. In her deposition, Plaintiff testified that (1) she had entered the store by way of the curb and knew a step was there; (2) she, nonetheless, got panicked when she could not see her husband and focused on finding him while she was exiting the store; (3) she would not have fallen if she had looked down; (4) she would not have noticed fluorescent marking on the curb in any event, due to her state of mind; and (5) she had no problem with the lighting. Finding that Defendant successfully negated the essential elements of Plaintiff's claim, we hold that the entry of judgment for the Defendant was proper. Affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Harold H. Parker, Murfreesboro, Tennessee, for the appellants Joann J. Sugg and Al Sugg.

Clifford Wilson and Marcia McShane Watson, Nashville, Tennessee, for the appellee, Mapco Express, Inc.

OPINION

JoAnn and Al Sugg (Mrs. Sugg, Mr. Sugg, or the Suggs) filed a negligence action against Mapco Express, Inc. (Mapco) on June 8, 2006, in connection with injuries sustained by Mrs. Sugg from falling when exiting a Mapco building. According to the complaint, a raised sidewalk surrounded the Mapco facility, which had two double-door entrances and two handicap ramps

"several feet" from the doorways. There is no dispute that on November 19, 2005, Mrs. Sugg entered the Mapco store while Mr. Sugg filled their van's tank with gasoline. Before Mrs. Sugg left the store, she could not locate Mr. Sugg or their vehicle, became distressed, and fell while exiting the store. Her husband had apparently moved the van away from the gas pump to give other patrons access to it.

In their complaint, the Suggs alleged that Mrs. Sugg's fall occurred because she could not "distinguish the step from the sidewalk to the parking lot." Specifically, the Suggs averred that Mapco's failure to mark or otherwise distinguish the step and its failure to provide sufficient lighting caused Mrs. Sugg to fall. It listed Mapco's failure to provide a sufficient distance between the doorway and the curb as a negligent act but did not indicate how the distance had affected Mrs. Sugg. Altogether, the Suggs sought to recover $275,000 in compensatory damages. In its August 23, 2006, answer, Mapco denied the allegations of negligence and affirmatively pled Mrs. Sugg's comparative fault.

On April 3, 2007, Mapco moved for summary judgment and argued that it owed no duty to Mrs. Sugg; that any reasonable actions on Mapco's part could not have prevented her fall; and that Mrs. Sugg's own negligence was equal to or greater than its purported fault. It also submitted a statement of undisputed facts to which the Suggs responded. The Suggs further submitted a separate statement of undisputed facts in opposition to Mapco's motion. In this statement, the Suggs set forth extensive information and assertions regarding the applicability of the Americans with Disabilities Act (ADA) to the case. Although the filing briefly cited to the record regarding Mrs. Sugg's physical problems, the bulk of it pertained to ADA regulations that the Suggs were then raising for the first time. Further, no affidavits accompanied the Suggs' papers. Notwithstanding these new assertions of law and fact, the Suggs never attempted to amend their complaint in any way.

On June 20, 2007, the trial court entered an order granting Mapco's motion for summary judgment, reasoning that Mrs. Sugg was fifty percent (50%) or more at fault in sustaining her injuries. The Suggs filed their notice of appeal on June 29, 2007.

Issues Presented

The Suggs present the following issues for review on appeal:

(1) Should the defendant's clear violations of the Americans with Disabilities Act which if obeyed by defendant would arguably have protected the plaintiffs from injury be enough evidence to overcome a summary judgment motion and allow the case to go to a jury where plaintiff fell from a curb entrance which she had entered earlier?

(2) Should the defendant's violation of the common law duty to warn of danger or remove hazards be enough evidence to overcome a summary judgment motion and allow the case to go to a jury where plaintiff fell from a curb that she had used earlier?

Mapco Express raises the following for this Court's review:

> (1) Whether summary judgment was properly granted because Plaintiff failed to establish a duty owed to [her] from Mapco; and
>
> (2) Even if a duty had been established, whether the trial court's granting of summary judgment was appropriate because the Plaintiff was responsible for no less than fifty (50%) of her injuries.

Standard of Review

The Suggs appeal the trial court's award of summary judgment to Mapco. We review an award of summary judgment *de novo*, affording no presumption of correctness to the conclusions of the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002). An award of summary judgment is appropriate if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Tenn. R. Civ. P. 56.04.

To support a motion for summary judgment, the movant must do more than assert, in a conclusory fashion, that the non-movant has no evidence. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). Instead, the movant "must either affirmatively negate an essential element of the non-movant's claim or conclusively establish an affirmative defense." *Id.* When a party has submitted a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *Id.*

In determining whether to award summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and the inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588.

Analysis

In the instant case, the Suggs proceeded on a negligence theory, alleging that Mapco's failure to mark the subject area and to light it properly resulted in Mrs. Sugg's injury. To succeed at trial, a plaintiff advancing a negligence theory must establish each of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate cause. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995). On appeal, the Suggs also advance a

negligence *per se* theory, attempting to show Mapco's duty and breach of that duty through purported ADA violations. At the outset, we note that the Suggs never amended their complaint to include the ADA violations.

The record reveals that in its statement of undisputed facts, Mapco supported the following assertions with citations to Mrs. Sugg's deposition, and that the Suggs either admitted to the facts or, at best, failed to deny them effectively. First, Mapco asserted that Mrs. Sugg had no complaint with the amount of light in front of the store and testified to "plenty of light" in the area where she fell. The Suggs admitted to this fact.

Second, Mapco contended that Mrs. Sugg had entered the store by way of the very step from which she fell and was thus aware of its existence. The Suggs admitted that Mrs. Sugg had used the same step when entering the store but denied that she knew there was a step separating the sidewalk and parking lot as follows:

> Denied. Plaintiff did not know there was a step separating the parking lot from the sidewalk at the time she exited the store. "The night that I fell, there was no sign there that says watch your step, and there was not yellow marking. Nothing at all that says step down or step up." (Citation to deposition omitted.)

Similarly, the Suggs denied that Mrs. Sugg knew she had stepped up a step when entering the store:

> Denied. Plaintiff did not know there was a step. "At home, there's a big yellow sign right on the handle there that says caution, watch your step." (Citation to deposition omitted.)

Although the Suggs cited to the record in these denials, the citations are not responsive to Mapco's assertions.

Third, Mapco asserted that Mrs. Sugg became panicked while inside the store and began to look for her husband outside. She testified that when she exited the store, she was not thinking about the lighting or the step. The Suggs admitted that she panicked and was trying to locate her husband but denied the substance of her verbatim testimony as follows:

> Denied. Not having a change of color on the curb caused Plaintiff not to notice the step. "At home, we have yellow here and yellow band around the top. It's on the top and – there's nothing there." (Citation to deposition omitted.)

We likewise consider this unresponsive assertion to be a bare denial.

Fourth, Mrs. Sugg testified that had she looked down when she exited the store, she would not have fallen. Mapco further asserted that Mrs. Sugg conceded in her deposition that even if the area of her fall had been painted a bright color, she would not have seen it because she was looking

for her husband rather than watching where she was walking. As to the former citation to Mrs. Sugg's deposition, the Suggs denied it and provided another unresponsive citation to her deposition. They also denied the latter assertion by stating as follows:

> Denied. Plaintiff is not competent to testify as a human factor engineer as to what might have caused her to notice the step.

Mapco's statement of undisputed facts and the Suggs' response to it reveal that there was sufficient lighting where Mrs. Sugg fell and that even if Mapco had marked the subject area with bright paint or signs, Mrs. Sugg would have fallen in any event because she was frantically looking for her husband instead of watching where she was stepping.

A review of Mrs. Sugg's deposition testimony further reinforces this conclusion. Regarding the events of that evening, Mrs. Sugg testified in her deposition as follows:

> Q: Well, you knew you stepped up this step onto the sidewalk when you went into the store, right?
>
> A: Yes, I did.
>
> Q: So you knew there was a step there?
>
> A: I knew there was a step there, yes.
>
> Q: And you knew you need to be careful when you're walking up a step and when you're walking down a step, especially someone who's got the medical problems that you do; isn't that true?
>
> A: Yes. And that's why we usually go in together.
>
> . . . .
>
> A. . . . I wasn't thinking about the light up there or the step here. I got panicked when I didn't see him, and I was trying to find him.
>
> Q: So you were looking around, trying find where your husband had moved the . . . van . . ., and you weren't really paying attention to where you were stepping; isn't that true?
>
> A: That's true.
>
> Q: Okay. And there was nothing to block your view of the sidewalk, was there?

A: Nothing to block my view of the sidewalk.

Q: And if you had looked down at your feet, as you were [exiting] the store, you would have seen that there was a sidewalk, and then you would have noticed that there was a drop off, where it goes to the driveway, correct?

A: If I had to look down to see that?

Q: Yes, ma'am.

A: I wouldn't have fallen.

Mrs. Sugg then testified as follows:

Q: But when you're leaving the store, if the side had been painted yellow, you would never have seen that, would you have?

A: At home, we have yellow here and yellow band around the top. It's on the top and – there's nothing there.

Q: But if it was painted bright purple, you wouldn't have seen it, because you were in a panic and you were looking for your husband.

A: I wouldn't have, but if there had been a ramp there, it wouldn't have been no edge to fall on either.

Q: But you're agreeing with me, aren't you, ma'am, even if that had been painted yellow, bright pink or fluorescent orange, you would not have been able to see the sidewalk, if it had been painted, because you were in a panic, because you were looking for where your husband had gone? Is that true?

. . . .

A: Yes.

In its motion for summary judgment and attached papers, Mapco affirmatively negated the essential elements of breach and cause in fact. It first established that the Suggs could not prove a breach of its duty to light the area. The record makes abundantly clear that there was plenty of light there and that Mrs. Sugg had no complaint with it. Mapco also showed that the Suggs could not establish its purported negligence as the cause in fact of her injuries. Causation, or cause in fact, pertains to the causal relationship between the tortious conduct and the injury; it means that "the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). In essence, Mrs. Sugg testified that nothing blocked her

view of the sidewalk, that she wasn't paying attention to where she was stepping, and that she would not have seen any markings highlighting the sidewalk step-down had they been there. She all but conceded that her failure to look down caused her fall.

When a party has submitted a properly supported motion for summary judgment, the burden shifts to the nonmoving party to establish the existence of disputed material facts. *McCarley*, 960 S.W.2d at 588.

> Non-moving parties may deflect a summary judgment motion challenging their ability to prove an essential element of their case by (1) pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) rehabilitating evidence challenged by the moving party, (3) producing additional evidence that creates a material factual dispute, or (4) submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. . . .
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> . . . .
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> Questions regarding breach of duty, causation in fact, and legal causation are ordinarily questions of fact for the jury. However, even these questions may be decided at the summary judgment stage if the evidence is uncontroverted and if the facts and the inferences drawn reasonably from the facts permit reasonable persons to draw only one conclusion.

Rains v. Bend of the River, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003) (citations omitted). The burden shifted to the Suggs to establish the existence of disputed material facts regarding Mapco's breach of duty as to the lighting and the causation of Mrs. Sugg's injuries. They did not offer any evidence showing the breach of Mapco's duty to light the area properly, nor did they establish some other basis for causation. In their lengthy statement of undisputed facts[1], the Suggs attempted to assert that Mapco's ADA violations formed the basis for its negligence *per se*. Even though the Suggs never amended their complaint to include these allegations, we note that negligence *per se* is not tantamount to liability *per se*. *Id.* at 590. Plaintiffs who proceed under a negligence *per se* theory must still prove causation in fact, legal cause, and injury. *Id.* (citing, *inter alia*, *McIntyre v. Balentine*, 833 S.W.2d 52, 59 (Tenn. 1992)).

[1] In their statement of undisputed facts, the Suggs insert information such as specific ADA regulations, as well as the assertion that Mrs. Sugg is a "disabled" person as contemplated by the guidelines. For example, they cite to the record to assert her status and highlight that she has rheumatoid arthritis, suffers from pulmonary fibrosis, and experiences trouble walking up and down stairs. They further contend that she has been approved for Social Security disability and, according to her treating physician, is totally disabled. This filing also adds several purported ADA violations on the part of Mapco that exceed the frame of their original complaint. For example, they assert that Mapco should have installed a ramp where Mrs. Sugg fell and posted a sign at the door indicating that there was a handicapped entrance at another location. As we noted before, however, the Suggs never attempted to amend their complaint so as to rely upon ADA violations as a basis for their action. We accordingly decline to address these points.

The trial court's finding that Ms. Sugg was more than 50% at fault for her injuries was unnecessary, as the Suggs could not establish the essential elements of their claim. We nonetheless affirm the trial court's award of summary judgment in favor of Mapco. Costs of this appeal are taxed to the Appellants, JoAnn Sugg and Al Sugg, and their surety, for which execution shall issue if necessary.

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DAVID R. FARMER, JUDGE